United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1363

To be argued by
STANLEY A. TEITLER

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1363

UNITED STATES OF AMERICA,
Appellee,

—*against*—

ANTHONY GUARDINO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
STANLEY A. TEITLER,
Assistant United States Attorneys,
Of Counsel.

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UNITED STATES OF AMERICA,

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Preliminary Statement

Appellant, Anthony Guardino, appeals from a judgment entered July 20, 1976, in the United States District Court for the Eastern District of New York (Platt, *J.*), upon his plea of guilty, convicting him of possession of cocaine with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1), and sentencing him to a term of imprisonment of six (6) years pursuant to Title 18, United States Code, Section 4205(b)(2), with a special parole term of ten (10) years.

On this appeal, appellant claims that the District Court committed plain error (i) by finding that the Government complied in all respects with its plea bargain agreement, and (ii) by penalizing him for failing to cooperate with the Government. Appellant is presently incarcerated pending this appeal.

Statement of Facts

By a two count indictment filed December 4, 1975, appellant Anthony Guardino was originally charged with both distribution of and possession with intent to distribute cocaine on May 1, 1975, in violation of Title 21, United States Code, Section 841(a)(1). Thereafter, on April 27, 1976, appellant plead guilty to a one count information, filed the same day, containing the May 1, 1975 cocaine possession charge.[1]

During the course of the April 27th proceedings, the District Court, pursuant to Rule 11, Federal Rules of Criminal Procedure, inquired of appellant whether threats or promises had been made in order to induce him to waive his right to a Grand Jury indictment. Appellant's counsel promptly responded that agreement had been reached with the Assistant United States Attorney and that the terms of the bargain had been arranged. Counsel explained that in accordance with her understanding, appellant was entering his plea to the information in satisfaction of all counts cognizable under Titles 18 and 21 of the United States Code, which could have been brought against him in connection with appellant's narcotics dealings.

Specifically, as the Court was informed, the arrangement contemplated that the Government would not prosecute appellant for any of the uncharged crimes contained in its investigative files which included, among others, narcotic sales to Government agents and an assault by appellant upon the Drug Enforcement Administration case agent in this action. As counsel stated to Judge Platt, the Government also had agreed not to prosecute appellant for related wire, mail,

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[1] The original indictment charged appellant with distribution of a gross weight of 52 grams of cocaine; the superseding information reflected net weight in the amount of 26.91 grams.

or conspiracy violations. Appellant's representation to the Court, agreed to by the Government, was as follows:

> THE COURT: Do you understand you have the right to indictment by a grand jury?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have any threats or promises been made to you to induce you to waive indictment?
>
> THE DEFENDANT: No, your Honor.
>
> MRS. ROSNER [appellant's counsel]: Your Honor, counsel and the government do have an understanding with respect to the plea being entertained here today. The government has agreed that the one count contained in the superseding information filed with the court will be in satisfaction of any and all of the crimes cognizable under Title 18 or Title 21 which are contained in the investigative report in this action in the folders of the United States Attorney, and that would include any sale—that would include any sale of a sample of any drugs to government undercover agents, a purported assault allegedly made upon the case agent in this action, and any wire counts or mail counts or any conspiracy counts which might arise out of the investigative folder, that is to say that the defendant will not be a party to any conspiracy action.
>
> THE COURT: And also, I suppose, that covers the two counts in the underlying indictment, 75-CR-920?
>
> MR. TEITLER [Assistant U.S. Attorney]: Yes, it does, your Honor. (Tr. 6-7, 4/27/76).

Thereafter, the prosecutor, on his own initiative, informed the Court that in addition to the facts presented

by appellant's counsel, he had also discussed with counsel her request that he possibly recommend to the Court the imposition of sentence under the Youth Corrections Act, Title 18, United States Code, Section 4209, so that appellant would be treated as a young adult offender. The prosecutor stated to Judge Platt he had told appellant's counsel that in this regard he would follow the existing policy of the United States Attorney's Office for the Eastern District of New York which was to not oppose or recommend any type of sentence:

> [Mr. Teitler] In addition to that I have discussed with Mrs. Rosner the possibility of the defendant being placed on Young Adult Offender treatment. I have explained to Mrs. Rosner that the policy of our office is neither to oppose nor favor any type of sentencing. I made it very clear to Mrs. Rosner, in view of that, that the government would not oppose such type of sentence being imposed on Mr. Guardino (*Id.* at 7).

At the conclusion of the prosecutor's remarks, he represented that this addition, coupled with counsel's presentation, was the "entire sum and substance" of the agreement. Appellant's counsel agreed by noting "And it is the entire sum and substance of the agreement underlying the plea, your Honor." (*Id.*) Appellant himself also acknowledged the accuracy and completeness of the recitation on the record and confirmed that no other promises were made to induce him to plead guilty (*Id.* at 8). In fact, on three later occasions, appellant recited that no other promises were made other than those previously stated and further admitted that no promises were made by the Government as to what sentence would be imposed (*Id.* at 10-12).

After a detailed discussion by the Court as to appellant's possible maximum sentence, including advice that

in view of appellant's age, twenty-four, he "may" be eligible for Youth Corrections Act treatment, the Court found that there was a factual predicate for appellant's plea, permitted the withdrawal of his formerly entered not guilty plea, and accepted his plea of guilty to the superseding information.[2]

Thereafter, prior to sentencing, the prosecutor was notified that appellant had caused two threats to be made on the life of the Government's informant in this case. On June 24, 1976, the prosecutor wrote a letter to the Court which set forth this information. Moreover, prior to its mailing, the prosecutor, as the Court was advised, had telephoned appellant's counsel to inform her of its existence and that it was being forwarded to the Court. The letter, which is a part of the record, provided as follows:

HAND DELIVERY

June 24, 1976

Honorable Thomas C. Platt
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States* v. *Anthony Guardino*
Docket No. 75 Cr. 920(S)

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[2] Judge Platt advised appellant concerning the Youth Corrections Act, stating: "Also since you are twenty-four years of age you may, and I stress the word may, because it depends upon your record and all the facts, may be eligible for the Youth Corrections Act." (Tr. 4/27/76).

Dear Judge Platt:

I have reviewed the Probation Report in the above matter and note that it fails to record that within the past month Anthony Guardino has threatened to kill the Government informer in this case. Two threats have been communicated to our informant, both of which were received by him through an interm ediary. One threat was transmitted directly by Mr. Guardino to the intermediary and the other emanated from another source.

We feel that this information is extremely relevant in your determination of the appropriate sentence to be imposed upon Mr. Guardino on June 25, 1976.

Respectfully yours,

DAVID G. TRAGER
United States Attorney

By: /s/ STANLEY T. TEITLER
Assistant U.S. Attorney

cc: Nancy Rosner, Esq
United States Department
of Probation

On June 25 the parties appeared before the District Judge Platt for appellant's sentencing. Appellant's counsel registered her objection to the Government's letter on the ground that the prosecutor's actions had violated the "letter and spirit" of the plea agreement. Appellant's counsel advised the Court that it was her understanding that the Government would not "make any kind of statement", "would remain mute at the time of sentence", and contended that this agreement was "of course, was recorded on the record at the time of the plea." (Tr. 4, 6/25/76).

Citing *United States* v. *Crusco*, 536 F.2d 21 (3d Cir. 1976), appellant argued below, as here, that where the Government agrees to stand mute at the time of sentence, indeed it must. Significantly, the accuracy of the letter's allegations were not in any way challenged, nor did appellant move to vacate the plea. The sole relief sought was to shift the matter to another District Judge for sentencing. In further reliance upon *Santobello* v. *New York*, 404 U.S. 257 (1971), appellant demanded specific performance of the agreement and the sealing of the Government's letter. The matter was thereafter adjourned so as to allow appellant sufficient time to prepare a written memorandum. While counsel advised that her brief would be filed by July 1, 1976, no papers in support of the motion were ever forthcoming.

At oral argument held on July 20, 1976, appellant's counsel argued that the very language transmitted in the Government's letter proved that the Government intended to "indicate to the Court that certainly Young Adult Offender Treatment would not be appropriate under the circumstances of the case" (Tr. 3, 7/20/76). Counsel reiterated its desire not to withdraw appellant's plea but only to seek specific performance of the agreement. The prosecutor stated:

> MR. TEITLER: Your Honor, I believe the transcript of the plea taken on April 27, 1976, basically speaks for itself, I am quite confident the Court has . . . [reviewed the] terms of the agreement. In addition, at the time of my conclusion of reciting what our entire agreement was, I stated on the record that that was the entire substance of the agreement, and Mrs. Rosner agreed that was the entire agreement, and Mr. Guardino also agreed that was the entire agreement.

> This Court is well aware of the United States Attorney's position with respect to sentencing, that in all but very exceptional cases we make a comment at the time of sentence as to whether or not the Government feels that a particular defendant ought to be imprisoned. When Mrs. Rosner originally approached me concerning our initial plea bargaining agreement, the prospect of the Youthful Offender treatment did come up, and my explanation was that certainly I would not say anything at the time of sentence with respect to any sentence, because that was not within the purview of the prosecutor's function, at least in the Eastern District of New York, in the absence of exceptional circumstances.
>
> At the time I made the statement I would not oppose it and I will not recommend it, and it's the statement I made throughout these proceedings, and it's the statement I made to the Court. (Id. at 4-5)

The District Court found that the agreement was clear on its face, that the prosecutor had not made any recommendation to the Court, that the prosecutor had not agreed to stand mute at the time of sentence and that the Government had not foreclosed itself from providing the Court with relevant information at the time of sentence.[3]

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[3] Judge Platt's findings were as follows:

THE COURT: Well, the Court has read the Crusco decision, which is a Third Circuit decision reported just recently. It was argued on March 26, 1976, filed on March 27, 1976. Santobello against New York, decision of United States Supreme Court called for [404] U.S. 257. United States against Hallum, decision which is in 472 Fed Second 179 the Ninth Circuit, and United States against Paiba, 294 Fed Supp Second 492, all of which was submitted by Mrs.

[Footnote continued on following page]

Rosner in support of her position, the Court feels that the record in this case is not the same as the record in those cases including the Crusco case. As the Court reads the agreement on page seven of the transcript, which was submitted yesterday, Mr. Teitler's agreement appears to the Court to be limited to whether or not it would oppose or be in favor of a Young Adult Offender treatment, is the way he characterizes it, which I think is more properly characterized Youth Correction Act treatment. The precise language to be used was "in addition to that I have discussed with Mrs. Rosner the possibility of the defendant being placed on the Young Adult Offender treatment. I have explained to Mrs. Rosner that the policy of our office is to neither oppose nor favor any type of sentencing. But I made it very clear to Mrs. Rosner, in view of that, that the Government would not oppose such type of sentencing being imposed on Mr. Guardino. "I believe that is the entire sum and substance of the agreement underlying the plea."

Now, as the Court reads back what Mr. Teitler says it's the policy of the office neither to oppose nor favor any type of sentencing, and in particular, in this instance, whether he should be treated as a Young Adult offender or whether he should be treated as an adult. He did not, as the Government apparently did in the Crusco case agree to remain silent at the time of sentencing or to abstain from taking a position on sentencing. The agreement he made was that he wouldn't take a position with respect to whether he should be treated under the Youth Corrections Act or he should not, as I read it. That seems to be the words you both used, "the entire sum and substance of the agreement," and I think given that, plus the fact that here again as distinguished from the cases cited, the events that occurred were not foreseeable by the Government. These events occurred apparently, or the event with respect to June 24, 1976, occurred after this discussion, occurred at the time of sentencing of the plea taking on April 27, 1976.

I think that the Government didn't foreclose itself from calling all of the relevant facts to the Court's attention at the time of sentencing, which is all they did in their letter of June 24, which they wrote, they did not

[Footnote continued on following page]

Appellant's counsel then spoke on her client's behalf in an effort to elicit a lenient sentence. Appellant was characterized as a victim of great psychological problems, a masochist with a strain of immaturity (Id. at 10). Counsel's presentation was obviously designed to persuade Judge Platt to sentence appellant as a Young Adult Offender. Oddly enough, while not denying appellant's threats on the life of another, reference was made to murders at Lewisburg Penitentiary, how appellant feared for his life and that because of this fear he had refused to cooperate with the Government. Counsel made further reference to appellant's father who had recently been imprisoned, and claimed that appellant, if sent to prison, would become "one of them, instead of one of us", a habitual criminal (Id. at 12).

Judge Platt in response queried counsel: "Isn't his chance to be one of us, as you put it, really on [sic] whether or not he is going to work for the Government at this stage?" The Court then observed that appellant possessed information relevant to a related case pending before it. He observed: "As far as I know there's been no indication at least up to date, that he's going to give it. I would take one view of this case where he could take that road, and quite a different view of this case if you take the road you suggest" (Id. at 13). Based solely upon this statement, counsel accused Judge Platt of penalizing appellant for his failure to cooperate, to which the Court replied "I am not penalizing him. . . . Don't put

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even at that time make a recommendation one way or the other with respect to whatever sentence the Court would impose.

So, that being the fact, the Court feels that the cases are not relevant or not important with respect to this particular issue, and the Court, under such circumstances feels that it would be improper for it to disqualify itself and improper for it to transfer this case to another judge at this time.

So it will deny your motion. (Tr. 6-9, 7/20/76)

words in my mouth, please. It's not a question of penalty. You are asking the man to get a break. I am saying the Court would if they [sic] gave the Government a break." (Id. at 14). Although the Court offered appellant time to consider its offer, the opportunity was declined.

In view of the seriousness of appellant's crime and his prior criminal record, the Court explicitly found that appellant would not benefit from a sentence under Youth Corrections Act. This appeal followed.

ARGUMENT

POINT I

The Government Complied with its Plea Agreement.

Appellant's claim that the Government breached the terms of the plea agreement simply does not withstand analysis. In essence, appellant's claim is solely addressed to the meaning of the words utilized in the formation of the agreement. We submit that the record reflects, in no uncertain terms, that all parties to the understanding had a clear, unequivocal meeting of the minds. There can be no question that the Government, rather than having agreed to stand mute at sentence, merely agreed that it would take no position regarding the imposition of a particular sentence or sentence under the Youth Corrections Act. The statement by the prosecutor that the Government would not oppose or recommend a particular sentence, but would follow the customary practice of the United States Attorney's Office and take no position was, to all parties, clear and unambiguous. Indeed, Judge Platt's findings that this was what was meant, we submit was correct. To contend otherwise is simply frivolous.

To argue that the Government acted improperly by forwarding relevant information to the Court is likewise disingenuous. Indeed, this Court has held that "[a] sentencing judge's access to information should be almost completely unfettered in order that he may 'acquire a thorough acquaintance with the character and history of the man before [him]'." *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); see, also, *United States* v. *Schipani*, 435 F.2d 26, 27 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971). The information forwarded by the Government, which was unchallenged below, was in this connection certainly most relevant. To contend otherwise would be tantamount to fettering the district court's access to necessary information.

We submit that *United States* v. *Crusco*, 534 F.2d (3d Cir. 1976), is inapposite to the facts presented here. In *Crusco*, the defendant was informed and promised by the Government that he faced a maximum "seven year" sentence. In addition, the *Crusco* prosecutor specifically offered defendant an *unqualified* promise that he would not take a position as to the maximum number of years of defendant's sentence. At sentencing, however, the prosecutor stated that defendant would endanger the community if he were on the streets since he was in fact a major figure in organized crime. The defendant was then sentenced to six years imprisonment with an additional three years special parole term. Immediately upon sentencing, the defendant sought to withdraw his plea on the grounds that he was misled as to the maximum sentence he faced and that the Government had broken its promise not to take a position on sentencing.

The lower Court refused to vacate the plea and the Third Circuit reversed on the grounds that the record revealed that, in all likelihood, the defendant had reasonably understood the promised maximum sentence of seven years to encompass the statutory three year special parole

term, rather than being in addition thereto. In short, the Court held that the defendant had apparently misunderstood the length of time he would be subject to custody and supervision under a sentence "not to exceed seven years" and treated the prosecutor's statement as a recommendation that defendant be sentenced to a prison term which violated the *specific promise* that he would make no comment on sentence. Accordingly, the Court reversed and remanded for resentencing.

As with *Crusco*, *Santobello* v. *New York*, 404 U.S. 257 (1971), is equally inapplicable here. In *Santobello*, the prosecutor had promised not to recommend a sentence, but a new prosecutor, in fact, did so. This was held error. The circumstances here do not present such a violation of the promise, nor, as we have argued, did the Government in any way, recommend any sentence. Nor can it be argued here, as was done in *Santobello*, that appellant's plea rested in any significant degree on the statement of the prosecutor so that it could be said to have been part of the inducement of the plea. 404 U.S. 257 at 264. In response to appellant's request for a recommendation as to the Youth Corrections Act, the prosecutor flatly denied that he would so do. Notwithstanding the Government's refusal, appellant plead guilty. The *quid pro quo* for the agreement was obviously the grant of informal immunity rather than any affirmative statement by the Government.

To argue that the submission of relevant information is somehow the same as a sentence recommendation is to strain *Santobello* unnaturally. Consequently, appellant's contention should be rejected.

POINT II

The District Court did not consider an improper factor in imposition of sentence.

Appellant also claims that the District Court allegedly penalized him for his failure to cooperate with the Government. This, we contend, is not so. As the record indicates, Judge Platt suggested that appellant consider rendering assistance to the Government and was willing, if necessary, to adjourn sentence. But Judge Platt's invitation to allow appellant more time to consider possible cooperation with the Government can not be construed as penalizing him for his failure to cooperate, although the Court, made it clear that it would consider any cooperation. Indeed, Judge Platt expressly stated that he was not "penalizing" appellant but would consider cooperation in deciding whether appellant should get the "break" counsel was seeking. Since it is clear that cooperation is an appropriate factor for the court to consider in imposing sentence, *cf. United States* v. *Araujo*, 485 F.2d 1213 (2nd Cir. 1976), we contend that there was no error committed.

We respectfully urge that *United States* v. *Vermeulen*, 436 F.2d 72 (2d Cir. 1970), governs here. There the defendant pleaded guilty to possession and use of a false passport in an attempt to evade the immigration laws and wilful use of a false United States Customs Declaration. The sentencing judge who was concerned over the defendant's failure to offer any explanation as to why he had used various aliases in connection with his entries into this country, prior to the imposition of sentence commented that if appellant should find some way of cooperating "he might be able to get some help in the reduction of any term that he may be sent up for." *Id.* at 74. Vermeulen chose to stand mute.

On appeal, Vermeulen contended that because he had refused to reply to the Court's question, the Court in effect had imposed a "price tag" on the assertion of his constitutional privilege to remain silent. This Court in refusing to credit such an argument recognized that the sentencing judge did not attempt to induce Vermeulen to confess his guilt of the crimes charged as a sign of repentance as had been done in *Scott* v. *United States*, 419 F.2d 264 (1969) and *Thomas* v. *United States*, 318 F.2d 941 (5th Cir. 1966), but rather, as with appellant, "The Court was engaged in an inquiry as to whether appellant wished to cooperate with the public authorities by giving information apparently regarding *others* involved in illegal international narcotics traffic. Perhaps for reasons involving a personal moral code, personal safety or otherwise, appellant chose to remain silent." 436 F.2d *supra*, at 76. This Court, in so holding recognized that it is not improper for a sentencing judge to consider cooperation in imposition of sentence.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: October 29, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
STANLEY A. TEITLER,
Assistant United States Attorneys,

★ U. S. Government Printing Office 1976—714—018—11

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 1st day of November, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Nancy Rosner, Esq.
401 Broadway
New York, N.Y. 10013

Evelyn Cohen

Sworn to before me this
1st day of Nov. 1976

Carolyn M. Johnson
Notary Public, New York

Term Expires March 30, 1977